NO. 20942

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT C. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from a conviction on twenty-six counts of mail fraud, in violation of Section 472, Title 18, United States Code.

On February 26, 1964, an indictment returned by the February, 1964, Grand Jury was filed in the United States District Court for the Southern District of California, Central Division. It charged that appellant, Robert C. Hill, devised a scheme and artifice to defraud business owners by collecting advance fees for services in securing loans, but not making any genuine effort to perform such services. Numerous false and fraudulent

representations used to carry out the scheme were alleged. Each of the twenty-nine counts of the indictment referred to a different use of the mails for the purpose of executing this scheme.

On April 13, 1964, the appellant entered a plea of not guilty to all counts. A trial by jury commenced on January 18, 1965, before the Honorable Raymond E. Plummer, United States District Judge. On the Government's motion, Counts 9, 16 and 24 were dismissed at the close of the Government's case [R. T. 1596]. On February 8, 1965, the jury returned a verdict of guilty on all remaining counts [R. T. 2201-02]. On April 23, 1965, Judge Plummer sentenced the appellant to a term of two years on each count, to run concurrently, and further ordered appellant to pay the cost of prosecution as provided by Section 1918(b), Title 28, United States Code [R. T. 2217].

Jurisdiction of the District Court was based upon Section 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal is derived from Sections 1291 and 1294, Title 28, United States Code.

II

SPECIFICATION OF ERRORS

Only two issues are raised by the argument presented in Appellant's Opening Brief:

(1) Did the trial court err in denying appellant's motion to suppress as evidence the corporate files of Inter-American Loan Service?

(2) Was the appellant denied due process of law by the conduct of the Government in handling of the corporate files of Inter-American Loan Service?

III

STATEMENT OF FACTS

In March of 1958, the appellant, Robert C. Hill, sought employment with the National Mortgage Company, Los Angeles, California [R. T. 207]. Although being unlicensed as a broker prevented his being hired, the appellant later enlisted the personal financial backing of the President of National Mortgage, to embark on his own business [R. T. 193, 195, 198]. Appellant was given a desk at the offices of National Mortgage to operate from [R. T. 200], and on April 11, 1958, he organized and incorporated the Inter-American Loan Service, Inc. (hereinafter referred to as IALS) [R. T. 249]. There was never any association or connection between IALS and National Mortgage Company, except use of the same office, and even this arrangement was permanently terminated as of July 9, 1958 [R. T. 203]. Appellant then established an office on Wilshire Boulevard in Los Angeles [R. T. 1587]. He continued to represent, however, on his corporate letterhead, that he was "associated with National Mortgage Company for 21

years" [R. T. 1587, 1965-66].

Ostensibly the purpose of IALS was to assist clients in borrowing money from lending institutions. Clients were initially sought by means of a flyer, which was mailed to businesses listed in the directories and telephone books of various cities [R. T. 657]. This flyer advised that "Amounts from $5,000 to $1,000,000 are available to firms on a Business Loan basis. If your company can use long-term financing, not readily available through your local bank, we may be able to help you." [Exhibit 26-A, R. T. 657]. Across the bottom, in bold letters, appeared the names of three cities: Los Angeles, Chicago and New York [R. T. 1879]. In fact, the office of IALS on Wilshire Boulevard was the only office in existence [R. T. 1881]. The flyer included a coupon, to be detached and mailed in to IALS. From the coupons returned, leads were established for contact by salesmen [R. T. 657].

Salesmen were recruited by the appellant through want-ads placed in newspapers. There was no requirement that they have any experience as financial consultants, or any qualifications to make financial, business and property surveys or reports. Nor were salesmen given any training in these respects [R. T. 649-52]. The salesmen were instructed to use a "negative sales pitch", collect an advance fee, and immediately convert the fee to a cashier's check and forward it to the company [R. T. 654].

Each salesman was equipped with a "kit", consisting of a certificate identifying himself, a map of the United States, a list of lending institutions, a schedule of fees, as well as contracts

and "data reports" to be filled out by the salesmen [R. T. 655 ff.].

Upon contacting prospects, the salesmen would display the map, bearing numerous red dots and labeled "Central Offices of Inter-American Loan Service", to create the impression that he represented a large, well-established firm [R. T. 1015, 1381-82]. The potential client would be shown a long list of lending institutions, which were represented as "outlets where money was available through Inter-American" [R. T. 1016, 1383]. Clients were told that, upon payment of a fee which varied according to the size of the loan, IALS would arrange a loan for them [R. T. 655-56]. Many of the clients were told that IALS had achieved success in obtaining loans for others [R. T. 1355], and that, in the event IALS was unsuccessful in procuring a loan for them, the fee would be refunded [R. T. 1385-86]. The appellant was made aware that his salesmen were making such representations through numerous letters of complaint [R. T. 1889-92]. On at least one occasion, the appellant himself told a client that the fee would be returned if his efforts to secure a loan did not succeed [R. T. 572, 1398]. Once the client was "sold", a contract was signed, and a "preliminary data report" was filled out [R. T. 658, 1386-87]. These documents, and a certified check for the advance fee, were then forwarded by mail to IALS for "acceptance" [R. T. 1386-87]. No application accompanied by the requisite fee was ever rejected [R. T. 675].

Upon receipt of these papers, a letter of acceptance was sent, including forms for the customer to list credit references

and return to IALS [R. T. 659]. These references were not verified [R. T. 678]. IALS then prepared a "financial bulletin" describing the client, and mailed this bulletin to various loan agencies. A form was also sent by mail to the client, listing the loan agencies to which the "financial bulletin" had been sent [R. T. 660]. As a general rule, the lending agencies that received these bulletins ignored them. IALS had no working agreement with any of these institutions, having selected their names at random from a telephone directory [R. T. 680, 682]. No effort was made to correlate the type of loan sought with the lending institution to which the "financial bulletin" was sent [R. T. 683-84], with often ludicrous results. For example, an investment company engaged exclusively in financing three-year conditional sales contracts on pianos and organs [R. T. 1173] was sent a bulletin describing a man seeking a loan of $40,000 for twenty years to expand his poultry supply business [R. T. 326, 1175, 1911]. A company which was engaged in purchasing conditional sales contracts from an affiliated automobile sales agency [R. T. 1307] was sent a bulletin describing a man in the wholesale pet supply business, seeking a loan of $25,000 for ten or fifteen years to build a warehouse [R. T. 1050, 1309, 1918].

Beyond the mailing of these "bulletins", little or no effort was made by IALS to secure loans for its clients [R. T. 682]. During the entire period of existence of IALS, the applications of approximately 200 people were accepted [R. T. 1986], and fees totaling $85,000 were collected [R. T. 1593], yet not one single

customer obtained a loan through its efforts, nor was an advance fee ever refunded or returned to any client [R. T. 693].

On March 30, 1959, the appellant was served with a "Desist and Refrain Order" by the California State Commissioner of Corporations, ordering him to refrain from further solicitation without a broker's license [R. T. 1842-43, 1975-77]. Shortly thereafter, an arrangement was made to turn over all the files concerning clients of IALS to United Lenders Service, a partnership consisting of two former employees of the appellant, the appellant's brother, and one Momaud Scherief [R. T. 662, 673, 178-85, 1983-84]. According to the appellant's own testimony, he retained no control or supervision over any of these files after they were transferred [R. T. 1982].

In the summer of 1959, an investigation commenced arising from a complaint filed against the appellant and others in Fresno County, California. Pursuant to that investigation, the Chief of Police of Selma, California, accompanied by a Deputy District Attorney for Fresno County, came to Los Angeles to obtain the corporate records of IALS [R. T. 153-54, 1725]. They secured a search warrant in Los Angeles County, but were unable to locate the records at the addresses designated in the warrant [R. T. 1726-27]. They then proceeded to the home of the appellant's brother, where they informed Phyllis Hill, the appellant's sister-in-law, that they were looking "for the records of the loan company". She told them they did not need a warrant, invited them in, took a key, opened a garage door, and showed them where the

records were stored [R. T. 155, 1728]. The officers then transported the records to the Fresno District Attorney's Office [R. T. 1730]. When an investigation was later commenced by the United States Postal Department, the records were turned over to a postal inspector [R. T. 1724, 1738]. This investigation led to the indictment of appellant on February 26, 1964. On April 10, 1964, a motion to suppress these files as evidence was filed and subsequently denied [C. T. 48]. The motion was renewed at trial, and reheard in conjunction with a motion to dismiss for lack of due process of law [R. T. 113-187; C. T. 75, 77]. Both motions were denied, and the records were subsequently admitted into evidence as plaintiff's Exhibits 1-33. The defendant was convicted by a jury of Counts 1-8, 10-15, 17-23, and 25-29 of the indictment [R. T. 2201-02], the Government having dismissed Counts 9, 16, and 24 [R. T. 1596].

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS AS EVIDENCE THE CORPORATE RECORDS OF INTER-AMERICAN LOAN SERVICE.

The trial court found no need to even consider the legality of the search by which the corporate records of Inter-American Loan Service were acquired. It based its denial of the motion to

suppress solely upon a finding that the appellant had no standing to make the motion:

> "I think that the distinction that must be made here is the fact that they were talking about corporate records. We do not have the corporation protesting, nor objecting, nor do we have the records being used against the corporation." [R. T. 184].

It is the position of the Government that this holding was consistent with the requirement of Rule 41(e), Federal Rules of Criminal Procedure, which provides that:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained. . . ." (emphasis added).

Appellant seeks to qualify as a "person aggrieved" by asserting his identity with the corporation: "Appellant was IALS." (Appellant's Opening Brief, p. 11). This argument was answered by the Second Circuit Court of Appeals in Lagow v. United States, 159 F. 2d 245, 246, cert. den. 331 U. S. 858 (1946):

> "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not

vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity. This we have four times decided. In Re Dooley, 48 F. 2d 121, United States v. De Vasto, 52 F. 2d 26, Connolly v. Medalie, 58 F. 2d 629, United States v. Antonelli Fireworks Co., 155 F. 2d 631."

The trial court placed specific reliance upon Lagow [R. T. 185], as have other district courts in United States v. Carroll, 144 F. Supp. 939 (S. D. N. Y. 1956), and United States v. Labovitz, 20 F. R. D. 307 (D. Mass. 1957).

Appellant relies upon Jones v. United States, 362 U. S. 257, 261 (1960), for its definition of the Rule 41(e) standing requirement:

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."

Appellant then seeks to define "victim" as the one against whom

evidence was being sought. Such is not the meaning of Jones. In Jones, the defendant was "using" a friend's apartment for one night. He was charged with facilitating the concealment of narcotics after narcotics were found in a bird's nest on an awning just outside a window of the apartment. In seeking to suppress the narcotics, defendant did not, of course, allege possession or ownership of the narcotics, and the only possessory interest in the apartment consisted of his friend's permission to use it. In reversing the trial court's holding that the defendant lacked standing, the Supreme Court advanced two alternative grounds. First, it held that where possession is the basis upon which conviction is sought, the defendant will have standing without a preliminary showing of an interest in the premises searched or the property seized. In other words, where the government bases its case upon possession, it is precluded from opposing a motion to suppress on the basis of standing. 362 U.S. 263-64. Secondly, the Court found that the legally requisite interest in the premises was satisfied. It held that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him". 362 U.S. at 267.

Here, unlike Jones, the Government's case was not based upon possession of IALS files; thus, appellant still had to show an interest either in the premises searched or the property seized. See Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966).

Appellant makes no claim of any interest in the premises

searched, or that he was on the premises where the search occurred. Nor can he claim an interest in the property seized. First, the separate identity of the corporation and its officers and/or shareholders must be recognized. The numerous cases holding that a corporate officer cannot refuse to produce corporate records under subpoena on the grounds of self-incrimination reinforce this distinction. See, e.g., Hyster v. United States, 338 F. 2d 182 (9th Cir. 1965); Wild v. Brewer, 329 F. 2d 924 (9th Cir. 1964); United States v. Goldberg, 330 F. 2d 30 (3rd Cir.), cert. den. 84 S. Ct. 1630 (1964), all decided since Jones. Secondly, whatever interest appellant may have had in the files was effectively transferred when a contract was entered to turn these files over to Mr. Sherief of United Lenders Service [R. T. 133-36]. The effect of this agreement can best be ascertained from the appellant's own testimony on cross-examination:

> "Q. Now, did you have any control or supervision over the manner in which Mr. Sherief would service your files?
>
> "A. No, I wouldn't say that I had any direct control over it, because I was out of the business." [R. T. 1982].

The appellant also places reliance upon decisions of the Fifth Circuit Court of Appeals, in Henzel v. United States, 296 F. 2d 650 (1961), and the Tenth Circuit Court of Appeals, in Villano v. United States, 310 F. 2d 680 (1962). The factual settings

of both of these cases, however, involved seizure from an office occupied and used by the defendant. No such interest in the premises searched is claimed by the appellant.

In Henzel, a Postal Inspector accompanied a deputy sheriff who was levying on a judgment against the corporation, and seized corporate records without a warrant. The trial judge denied a motion to suppress on grounds the defendant lacked standing. In reversing, the Fifth Circuit Court of Appeals emphasized these facts:

> "In the instant case, the appellant was the organizer, sole stockholder, and president of Chemoil Corporation. Appellant prepared much of the material seized, and this material was kept in his office along with some of his personal belongings. Although he was temporarily absent from his office when it was searched, appellant spent the greater part of every average working day there." 296 F. 2d at 653.

In a subsequent case, where the issue of standing was not reached, the same court cautioned that Henzel, supra, stands on its facts. Peel v. United States, 316 F. 2d 907, 909, cert. den. 84 S. Ct. 174 (1963).

Similarly, Villano, supra, recognized the standing of a defendant to suppress corporate papers removed from his desk in his presence, after he had been awakened before dawn at his

residence, and taken by police to his place of business.

The importance of the factual settings of these cases was illustrated in the decision of the U. S. District Court for the District Court for the District of Maryland, in United States v. Culver, 224 F. Supp. 419 (1963). In denying standing to the defendants to suppress the records of a corporation which they organized and owned, the court discussed Henzel and distinguished it as follows:

> "But there is no allegation or evidence that any defendant maintained his personal office in any office of SFIC or in any office of any association, or kept any of his personal papers in any such office, or was ever present when any paper was obtained by a postal inspector." 224 F. Supp. at 427.

Since the appellant claims no interest in the premises searched, and since he has no interest in the property seized, even under the broad test of Jones v. United States, supra, he does not qualify as a "person aggrieved" within the meaning of Rule 41(e). He is, rather, "one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . .". Jones v. United States, 362 U.S. 257, 261 (1960).

B. APPELLANT WAS NOT DENIED DUE PROCESS OF LAW BY THE CONDUCT OF THE GOVERNMENT IN HANDLING OF THE CORPORATE FILES OF INTER-AMERICAN LOAN SERVICE.

It was never made clear to the trial judge upon what basis the defendant claimed a denial of due process of law [R. T. 185]. Appellant's Opening Brief provides little further enlightenment. Except for the appellant's own vague assertion that documents were missing, there is nothing in the record to support the accusation that "all documents that were favorable to appellant were discarded" (Appellant's Opening Brief, p. 21). Quite to the contrary, the testimony of the appellant's own witnesses established the care with which these documents were handled [R. T. 1732, 1737-38]. The police chief who originally seized the files testified at trial that the files were in the same condition as at the time of seizure [R. T. 520]. On numerous occasions, appellant was given an opportunity to examine the files in the Government's possession, without benefit of a court order [R. T. 1837-39].

The Government is well aware of its obligation to make available to the defense any evidence favorable to the accused. Brady v. Maryland, 373 U. S. 83 (1963). Such an obligation cannot be imposed, however, where the existence of such evidence, much less its possession by the Government, is not established. The Government could be ordered to do no more than it has already done: throw open its entire files for the appellant to peruse at his leisure.

V

CONCLUSION

There appearing no error in the rulings of the court below, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen

GERALD F. UELMEN